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Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 585

JOHN POKORA, PETITIONER,

VS.

THE WABASH RAILWAY COMPANY, A CORPORATION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF PETITIONER IN SUPPORT THEREOF.

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Charles S. Andrus, Esq.,
Counsel for Petitioner.

Walter M. Allen, Esq.,
Henry A. Converse, Esq.,
Counsel for Respondent.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John Pokora, by W. St. John Wines, his attorney, respectfully represents:

STATEMENT OF THE CASE.

This action was brought to recover $50,000.00 damages alleged to have been sustained by John Pokora as a result of being struck by a Wabash Railway train at a grade crossing in the City of Springfield, Illinois. At the conclusion of the evidence for the plaintiff, Judge Louis FitzHenry directed a verdict for the defendant. The only error assigned is the action of the trial judge in directing a verdict for the defendant. This suit was originally started in the Circuit Court of Sangamon County and later removed to the United States District Court by the defendant.

The first count of the declaration contained a general charge of negligence, a very serious and permanent injury to the plaintiff, and the destruction of his automobile truck which was struck by the train. (Tr. 4.) The second count of the declaration was a special negligence count setting up the environment in detail and alleging, among other things, that the defendant had negligently placed certain freight cars on a switch track in close proximity to the intersection in question, and that it negligently operated its train toward the intersection at a high and dangerous rate of speed, whereby the plaintiff was injured. (Tr. 5.)

The third count of the declaration, which was most strongly relied on by counsel for plaintiff, was a count charging a willful and wanton injury inflicted on the plaintiff by the defendant. (Tr. 7.) In this count the environment was set forth in great detail, alleging that

the defendant was operating a passenger train south on Tenth Street approaching the intersection of Edwards Street, both of said streets being closely built up and being in a thickly populated section of the city, approximately five blocks south of defendant's passenger station; that on the day in question and for a long period of time immediately prior thereto, the defendant had not maintained a flagman at said intersection, at the hour in question, nor any crossing gates, nor any signal device of any kind to warn persons about to cross said railroad tracks; that a certain building at the northeast corner of said intersection was built flush with the sidewalk line and obstructed the view to the north of persons driving west on Edwards Street toward said railroad tracks; that the defendant was using four tracks which crossed said intersection, the east one of said tracks being used as a storage track for freight cars which had been placed on said track to within a few feet of the north line of Edwards Street which cars further obstructed the view; that persons travelling west on Edwards Street towards said tracks were peculiarly and extraordinarily exposed to danger unless said trains approaching said intersection from the north were travelling and operating with especial care and caution and at a low and moderate rate of speed, all of which facts were then and there well known to the defendant. That at about six o'clock A. M., on the day in question, plaintiff was driving his automobile truck west on Edwards Street and that before crossing or attempting to cross said tracks he stopped his automobile adjacent to said tracks, looked in both direc-

tions and listened for the sound of an engine bell or whistle to ascertain whether any train of the defendant was approaching said intersection; that he saw no train approaching from either direction and that no bell or whistle on any approaching engine was rung or sounded by the defendant, whereupon he started his automobile and attempted to cross said track; that as he drove on to the second or main track he saw an engine and train of cars approaching from the north at a high and dangerous rate of speed, but it was then too late for him to either stop his car or clear the track. That in view of the premises heretofore stated, the defendant then and there, by its servants, with intentional disregard of its duties in that behalf and with a disregard of the consequences to persons lawfully using said intersection, and with a willingness to inflict injury upon any such user of said intersection, drove the said engine against the automobile in which the plaintiff was riding and he was thereby seriously and permanently injured, wherefore the plaintiff avers that the injuries then and there inflicted upon him by the defendant were willfully and wantonly inflicted.

After removal of this cause the defendant filed a plea of the general issue (Tr. 21); a special plea alleging that the injury and damage to the plaintiff and his automobile was the result of the negligence of the plaintiff; a second special plea to the first and second counts of the declaration alleging that the injury to plaintiff and his automobile was the result of contributory negligence on the part of the plaintiff; a third special plea to the third count of the declaration alleging that the plaintiff

willfully and with reckless and conscious disregard of his own safety and of the automobile operated by him and of the safety of passengers and employees on trains of the defendant, approached and went upon said crossing without exercising any reasonable precaution to discover the approach of a train upon said tracks, and that the conduct of plaintiff in so approaching said crossing was willful and wanton and contributed to the injuries and damages complained of by the plaintiff; and a fourth special plea alleged that the defendant was not the owner of said automobile, nor did he have any right, title or interest in and to the same.

Later the defendant joined issue on the plea of the general issue, demurred to the first and third special pleas, and by replication joined issue on the second and fourth special pleas. (Tr. 23.)

The demurrer to the first and third special pleas was argued. The defendant entered a motion to carry the demurrer to said pleas back to the third count of the declaration (Tr. 25), but the court denied said motion and in the same order (Tr. 26) overruled the demurrer to the first special plea and sustained the demurrer to the third special plea. The effect of this order will be discussed in the argument.

On June 22, 1932, a jury was selected to try this case (Tr. 26), and trial was entered upon and on the following day at the conclusion of all of the evidence offered in behalf of the plaintiff, the trial judge instructed the jury to return a verdict finding the defendant not guilty. An appeal to the Circuit Court of Appeals was thereafter perfected.

To sustain the charges contained in the declaration of the plaintiff, fifteen witnesses were introduced. Wade Seeley (Tr. 29), a civil engiener and surveyor for the past twenty-seven years, identified a plat made by him of the intersection in question, showing in detail the location of the tracks, width of the streets, location of the buildings, obstructions to the view of persons travelling west on Edwards Street, and various measurements appearing on the plat. This plat was introduced without objection and is most important in the opinion of counsel for the plaintiff. Attention will be called to it later in the argument.

John Pokora, plaintiff (Tr. 29), testified that he was engaged in the grocery and ice business and that on August 17, 1929, the morning in question, he left home at 5:45 A. M., in his truck for the purpose of securing a load of ice from the ice house at Tenth and Edwards Streets. The ice company maintains a large three-story building at the northeast corner of said intersection and another large building at the southwest corner of said intersection, which was on the opposite side of the Wabash tracks. He stopped first at the building on the east side of said tracks, but as there were many trucks waiting there for ice he decided to go to the other ice house on the west side of the tracks. A string of box cars had been set on the east switch track, which is adjacent to the ice house on the northeast corner, and were placed within a few feet of the north line of Edwards Street. He stopped his truck before venturing on to this switch track, looked and

listened, and hearing no train coming, started his car up, crossing the switch track close to the box cars which were standing there, and as he emerged from behind the box cars he was struck by a passenger train bearing down upon him from the north. He described his injuries in detail which, as the court will perceive from this record, were extremely serious and permanent.

On cross examination Pokora stated he had been in the ice business for nine or ten years and used about three truck loads a day. On the day in question he was down there about six o'clock A. M., but on other days during the summer he would go for ice about 7 or 7:30 A. M., and that if the ice house on the east side of the tracks were busy he would go to the one on the west side. He had seen that train go through on other days. He knew there was a railroad track there and had crossed it many times. He had seen a watchman there after seven o'clock in the morning. As he approached the first track he stopped his truck, looked to the north and then started it up again when he was struck. (Tr. 31-33.)

Mike Ushman testified that he was driving an automobile right behind Pokora at the time in question; that Pokora was driving west on the north side of the street and stopped ten or fifteen feet before he got to the track, then went ahead and his truck was struck by the train. Ushman did not hear any whistle sounded by the train, nor any bell. He stated that the back end of the train ran five or six hundred feet south of the Edwards Street crossing before it stopped. (Tr. 34.) On

cross examination he stated that Pokora went by the first ice house slow, looking in there, then went on toward the track and stopped. He was ahead of the witness and the witness could not go past him. Pokora then started up and the first the witness knew that there was going to be an accident was when he heard the crash. The train hit Pokora, not Pokora the train. The witness saw the box cars standing on the track close to Edwards Street. (Tr. 35.)

Henry Buckholdt, an eleven year old boy, lived one block east of the tracks at 11th Street. The boy was out in front of his father's bakery and saw Pokora going west toward the tracks. Pokora had stopped before starting across the tracks, then started up again when the train hit him. The witness ran to the scene of the accident and saw Pokora lying at a switch on the east side of the track. (Tr. 35.)

Henry A. Buckholdt, Sr., father of the lad, stated he could ordinarily hear a whistle when blown or a bell when rung, but he did not hear any bell or whistle on that train that morning. (Tr. 37.)

Henry Roy was also driving a car behind Pokora. The cars ahead of the witness stopped. Witness did not hear any whistle or bell. He stated that the train ran 100 to 150 feet south of the crossing before it stopped. (Tr. 37.)

Otto Goetz was in charge of the loading platform at the ice house on the east side of the track. He did not hear the crash on account of the noise of the ice machine, but when he learned that there had been an

accident he went over and helped pick Pokora up. He stated that Pokora had previously stopped at his ice house for ice, but the witness waved him on across the tracks as that platform was croweded. (Tr. 39.)

Dr. Irving Metz, a practicing physician for thirty years, attended Pokora from the date of his injury on August 17, 1929, up to the time of the trial. Pokora had a fracture at the base of the skull, extending back along the parietal margin and into the occipital region. He had a comminuted fracture of the right leg at the juncture of the upper and middle third; a compound comminuted fracture of the left leg at the juncture of the lower and middle third; a rupture of the ear drum, and numerous bruises and abrasions over the body. A number of X-ray pictures were taken and exhibited and explained to the jury. (Tr. 41.) The hospital bill amounted to $617.99 and the doctor bill to $800.00. (Tr. 42.) At the time of the trial the legs were healed with the exception of a small opening in each leg, which exudes serum. A spiculum or sliver of bone worked out about a week ago. The bones had been shattered and practically none of those pieces had been removed from the locus. (Tr. 43.)

Doctor Arthur E. Walter, eye, ear, nose and throat specialist, testified that he examined Pokora on the morning of the trial and that he had a rupture of the right ear drum. He could hear a watch tick on contact, but normally he should be able to hear a watch tick at from 24 to 30 inches. (Tr. 44.)

Fred C. Sharafin testified that he sold the Federal motor truck to Pokora for $1,500.00; that he examined it

after it had been struck by the Wabash train and it was beyond repair. (Tr. 44.)

James B. Yates, a motor mechanic, testified that he examined the truck after the wreck and that it was beyond repair. (Tr. 44.)

Roland Burris lived in the first house on the north side of Edwards Street west of the track. He stated he did not hear any whistle or bell sounded, by that train, that he did not pay much attention to it. (Tr. 45.) He stated that the last coach on the train was past the south side of the sidewalk, a little ways. On cross examination he stated that the train was 50 or 75 feet south of the crossing, and that he noticed the freight cars standing on the east track, which cars were about six or eight feet from the sidewalk line. (Tr. 46.)

Mrs. Eva Burris, the wife of Roland Burris, was seated on her front porch reading the paper. She did not hear any whistle blown or any bell rung on the train that morning. She stated that the back end of the train was just beyond the sidewalk line on the south side of Edwards Street. She noticed a box car standing on the switch track. (Tr. 47.) On cross examination she stated in substance that she was sure she did not hear any bell.

M. R. Hodges, a salesman for the Springfield Produce Company, which is located on Tenth Street two blocks north of the intersection in question, described the location of various buildings along the tracks, that the Wabash tracks are four blocks east of the public square, that the section in question is not residential at all, but a business section, that he observed the

Wabash train going south that morning and as it passed his place of business that morning it was going 25 or 30 miles per hour, like it was making up time; it was past time. Train passes within 25 feet of his chair, he has pretty good ears, and did not hear any bell or whistle as it passed. (Tr. 48.)

Clarence Stanberry was an employee of the ice company, as a driver of one of their wagons. At the time Pokora's truck was struck by the train he was loading ice cubes on Edwards Street. His attention was attracted when he heard the train hit the truck. He stated that he did not hear any whistle blown, nor bell rung and could have heard it if one had been sounded. He went to the place where Pokora was lying and described the situation. (Tr. 50.)

Plaintiff here rested his case (Tr. 52), and a motion for a directed verdict was entered and argued after the jury had been excused.

CONTESTED ISSUES AND ERRORS RELIED ON.

No evidence was offered on the trial in behalf of the defendant, hence, there was no contested issue of fact, so far as evidence is concerned, as to the speed of the train at the time in question, as to the obstructions to the view of a traveler approaching the tracks, nor as to the failure of the train crew to ring a bell or sound a whistle while passing through a closely built up business district of the City of Springfield, nor as to the absence of a flagman, crossing gates, or other warning devices to travelers.

The various pleas filed by the defendant did raise issues of fact, but the trial court held as a matter of law that under the holding of the Supreme Court in the Goodman case, and the holding by the Circuit Court of Appeals in the Zayac case, the trial court felt compelled to perform an unpleasant duty against a man who is so grievously injured as this man is. (Tr. 56.)

Appellant contends that the decisions in *B. & O. R. R. v. Goodman*, 275 U. S. 66, and *Wabash R. R. Co. v. Zayac*, 30 F. (2nd) 764, are inapplicable to the facts presented by the evidence offered in the instant case, and that the evidence offered for plaintiff, for the purpose of the motion for a directed verdict, should be taken as true. The view of counsel for appellant as to the differentiation which should be made between the instant case and the cases referred to, will be suggested in the argument.

W. St. John Wines,
Counsel for Petitioner.

BRIEF OF AUTHORITIES AND PROPOSITIONS OF LAW RELIED ON.

I.

The statement in the case of *B. & O. R. R. Co.* v. *Goodman*, 275 U. S., page 66, in which it is stated, "it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than stop and look," was rendered in a crossing case in the country where trains may operate without any restricted speed limits, and is not applicable to travellers in populous cities who are about to cross railroad tracks.

II.

All grade crossing injury cases do not fall within the "applicable standard of conduct" mentioned in the *Goodman* case. The jury have a right to find the character and extent of traffic, the extent and kind of the obstacles to view, both artificial and natural, the composite effect of the environment, including failure to maintain special warning signals, the speed of the train, and that such composite effect may, under all the circumstances, amount to negligence (or wilfulness) on the part of the railroad company.

Norfolk & W. Ry. Co. v. *Holbrook*, 27 Fed. (2nd) 326.

Erie v. *Weinstein*, (C. C. A.) 166 F. 271.

III.

"There have been quite a number of cases wherein Circuit Courts of Appeals have distinguished the Goodman case, and have supported recoveries in railroad crossing accidents where persons attempting to cross tracks in an automobile did not go to the rarely exceptional extreme of leaving the car and going forward to see if a train was approaching. Among them are *C. & O. Ry. Co.* v. *Waid*, 25 F. (2d) 366 (C. C. A. 4); *Norfolk & W. Ry. Co.* v. *Holbrook*, 27 F. (2d) 326 (C. C. A. 6); *Canadian Pac. Ry. Co.* v. *Slayton*, 29 F. (2d) 687 (C. C. A. 2); *Leuthold et al.* v. *Penna. R. Co.*, 33 F. (2d) 758 (C. C. A. 6); *Teague* v. *St. L. S. W. Ry. Co.*, 36 F. (2d) 217 (C. C. A. 5). In the first and last of these cases certiorari was applied for and denied. 278 U. S. 629, 281 U. S. 733."

Dissenting opinion by Alschuler, Circuit Judge. (Tr. 74.)

IV.

Ches. & O. Ry. Co. v. *Waid*, 25 F. (2d) 366, discusses the Goodman case and differentiates it; and in discussing the matter says, that "one of the circumstances is the rightful expectation of the traveler that the railroad will perform the duty required by law and by ordinary care, of warning him by sounding a locomotive bell or whistle on approaching a crossing. Whether a traveler on a highway has looked and listened as a man of ordinary prudence would, is generally a question for the jury."

V.

Canadian Pac. Ry. Co. v. *Slayton*, 29 F. (2nd) 687 (1928), Second Circuit, opinion by Justice Manton, distinguishes the Goodman case and affirms a verdict by a jury in favor of plaintiff. The injury occurred in a village of 7,000 inhabitants and the opinion states that defendant in error's intestate was driving at about 10 miles an hour and looked and listened, but the opinion does not state that he stopped before attempting to cross the tracks. In the instant case the plaintiff stopped, looked and listened. The plaintiff was struck at a busy intersection of a city containing 71,864 inhabitants, and at a place where the defendant railroad company had placed cars which obstructed the view, and without sounding a whistle or bell as the train approached the intersection.

VI.

Luethold v. *Penna. R. Co.*, 33 F. (2nd) 758, appealed from the sixth circuit, June, 1929, discloses that the plaintiffs were injured when they drove onto a railroad crossing in Bucyrus, Ohio, at a speed of 10 or 12 miles an hour, without stopping, where the view was obstructed by sheds and buildings, where a flagman was usually stationed but who was not present at the time; that there was negligence in operating the train at excessive speed and in failing to signal its approach to the crossing. The Court of Appeals held that *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, did not govern, and reversed and remanded the case for submission to a jury.

VII.

The case of *Teague v. St. Louis S. Western Ry. Co.*, 36 F. (2nd) 217, is on all fours with the instant case. The collision occurred in daytime at a crossing in the City of Texarkana and was based on the alleged negligence of appellee in failing to maintain a proper warning of the approach of the train. The appellant stopped, looked and listened but his view was obstructed by tank cars on a side track in the direction from which the train came. The testimony showed that there were many automobiles on the street, that the train was coasting and making but little noise, and that an electric gong at the crossing was out of order. The trial court directed a verdict under *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, but the Court of Appeals reversed and remanded for submission to a jury. Certiorari in the Supreme Court was denied.

VIII.

Wilfulness may be defined as an intentional disregard of a known duty necessary to the safety of a person, and an entire want of care for the life or the person of others, when it exhibits a conscious indifference to consequences. It is not necessary to show that the person charged with wilfulness was actuated by ill will, or had prior knowledge that the person injured was in such a position as to be likely to be injured, but, in order to prove wilfulness it is enough if the evidence shows such gross misconduct on the part of the defendants or their employes as implies a dis-

regard of the rights and the safety of the public generally and a willingness to inflict injury.

Taylor, Admr., v. *Wheelock et al.*, 249 Ill. App. 152 (157-161).

Bremer v. *L. E. & W. R. R. Co.*, 318 Ill. 11 (pages 17 *et seq.*).

L. S. & M. S. Ry. Co. v. *Bodemer*, 139 Ill. 596 (606).

Walldren Express Co. v. *Krug*, 291 Ill. 472 (476-477).

IX.

The defense of contributory negligence does not apply to injuries wilfully or intentionally inflicted.

Rost v. *Noble & Co.*, 316 Ill. 357 (374).

Walldren Ex. Co. v. *Krug*, 291 Ill. 472 (476 *et seq.*).

Heidenreich v. *Bremner*, 260 Ill. 439 (446 *et seq.*).

Wab. R. R. Co. v. *Speer*, 156 Ill. 244 (251).

X.

Where the averment is made that the injury was wantonly and wilfully inflicted, it is a question for the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a wilful disregard of consequences or a willingness to inflict an injury.

Walldren Ex. Co. v. *Krug*, 291 Ill. 472 (476).

Vette v. *Sanitary District*, 260 Ill. 432 (438).

I. C. R. R. Co. v. *Leiner*, 202 Ill. 624 (629).

L. S. & M. S. Ry. Co. v. *Bodemer*, 139 Ill. 596 (606).

XI.

Where a charge of wilful and wanton conduct on the part of the defendant resulting in injury to the plaintiff is made, the defendant is not entitled to set up the defense that the wilful conduct of the plaintiff contributed to his injury and that therefore there can be no recovery.

Central of Georgia Ry. Co. v. *Partridge*, 136 Ala. (587).

L. & N. R. R. Co. v. *Orr, Admr.*, 121 Ala. 489 (499).

L. & N. R. R. Co. v. *Markee*, 403 Ala. 160 (170) Reptd. also in 15 So. 511, and 49 A. S. 21.

SUMMARY OF ARGUMENT.

At the conclusion of the evidence offered in behalf of petitioner, the trial court, on motion of the defendant, instructed the jury to find a verdict in favor of the defendant. The court announced that the instruction was given in accordance with the views expressed by the Supreme Court of the United States in the *Goodman Case*, 275 U. S. 66, and the *Zayac Case*, decided by the Circuit Court of Appeals, Seventh Circuit, 30 Fed. (2nd) 764.

The argument in this case differentiates it from the two cases just mentioned in that in those cases the drivers of the automobiles in question failed to stop before attempting to cross the tracks. The argument stresses the fact that in the *Goodman* case, the injury was inflicted at a grade crossing in the country where there is no restriction as to the speed at which a train may travel. In the *Zayac* case, the opinion discloses that while the injury was inflicted three blocks inside the limits of the

Village of Staunton, there was nothing that obstructed the view for a long distance. A further differentiation is stressed, in that the instant case contained a count charging a wilful and wanton injury whereas the *Goodman* and *Zajac* cases contained no such count.

On demurrer filed by the defendant to the wilful and wanton count, the court held such count good. This count sets up the environment and is a count which has been held good many times by Illinois and other courts. It alleges certain obstructions to the view of a traveler about to cross the railroad tracks at the intersection in question, including freight cars placed by the defendant on a sidetrack adjacent to the intersection, which sidetrack the plaintiff was obliged to cross before crossing the main track on which the train was running, which struck plaintiff's automobile, that the intersection in question was a closely built up business section of the City of Springfield; that the train was running at a high and dangerous rate of speed and that no whistle was sounded nor was any bell rung as the train approached said intersection. It is contended that where there is a wilful and wanton count that contributory negligence is not a defense to an injury so inflicted, and that there was sufficient evidence tendered to support the wilful and wanton count to require the submission of the case to the jury for its consideration.

ARGUMENT.

It is perhaps not unfair to state that before this suit was commenced counsel for appellant were familiar with the *Goodman* and *Zayac* cases and that this suit never would have been instituted by present counsel for appellant if appellant had attempted to cross the tracks in question without coming to a full stop, looking and listening. Nor would this case have been started had it been a grade crossing case in the country.

It is fair to presume that counsel for appellant were entirely familiar not only with the testimony which appellant was expected to give in his own behalf, but were likewise familiar with the testimony of Mike Ushman (Tr. 34) and Henry Roy (Tr. 37), who were in two cars next behind appellant and who were compelled to stop by reason of the fact that appellant stopped before attempting to cross the tracks.

The testimony of appellant, which, for the purpose of the motion to direct a verdict, must be taken as true, is, that as he approached the tracks certain freight cars were standing on the east or switch track next to the ice house within a few feet of the north sidewalk on Edwards Street. Appellant stopped his car before driving on to the east track, which was the sensible thing to do because if an engine had been attached to the cars on the side-track and had started to back them south while plaintiff was on that track, he would have had no possible chance to save himself. It is perhaps true that if he had driven

onto the switch track and had stopped his car within two or three feet of the rails on the second or main track, which he was obliged to cross, he might have had a view of the approaching train farther down the track than he had from the point at which he did stop. A reference to the plat introduced in evidence will disclose that there is only a space of eight feet between the rails on the switch track and on the main track, and with freight cars standing on the switch track extending on either side of the rails, and when it is considered that the front end of an automobile truck extends to a considerable distance in front of the seat occupied by the driver, it will be noted that appellant would have had to have the front end of his car approximately within striking distance of a passing train before he could see an approaching train on the main track.

While we do not contend that it was unlawful for the defendant to place box cars on the sidetrack either with or without an engine attached thereto, still, the cars were placed there by the defendant and could easily be seen by the engineer and fireman of the passenger train approaching from the north. The train crew were presumably as familiar with the crossing in question as was appellant and with the obstructions to the view of a driver who was proceeding west on Edwards Street. The train crew was also presumably familiar with the fact that the crossing flagman did not go on duty until seven o'clock A. M., and that there were no gates, bars, or warning devices of any kind installed at that crossing. The train crew were also familiar with the district in question and for the purpose of the motion for a di-

rected verdict it must be taken as true that no whistle or bell was sounded as the train approached the intersection.

People are only human beings after all, and the law only requires of people that they act with such care and caution for their own safety and for the safety of others as ordinarily reasonable and prudent people would exercise under the same or similar circumstances. This rule applies both to appellant and to the train crew of the defendant. In order to determine whether such care had been exercised by the parties to this suit, all of the facts and circumstances and all of the environment alleged in the declaration and testified to in behalf of appellant must be considered.

It is true that under the negligence counts in the declaration, appellant must establish by the greater weight of the evidence, not only negligence on the part of the defendant, but freedom from contributory negligence on his own part, before he would be entitled to recover damages.

Under the third count of the declaration which charges a willful and wanton injury inflicted by the defendant, there is no allegation, and it was not necessary to prove freedom from contributory negligence on the part of appellant. Appellee sought to eliminate the effect of the third count of the declaration by filing a third special plea (Tr. 22) alleging that the plaintiff willfully went upon said crossing without stopping, looking or listening for an approaching train at a place where he could see and hear an approaching train, and

without exercising any reasonable precaution to discover the approach of a train, and that such conduct was willful and wanton and contributed to the plaintiff's injuries. A demurrer was filed to this plea and a motion made to carry the demurrer back to the third count of the declaration, but the court sustained the demurrer to the plea and overruled the motion to carry the demurrer back to the declaration. (Tr. 25.) No cross error has been assigned and it therefore follows that the third count of the declaration states a cause of action, and if there be evidence in the record to sustain the allegations of that count, the court should not have directed a verdict, but the court should have required the defendant to put in its evidence.

The instant case is distinguishable from the *Goodman* and *Zayac* cases primarily for the reason that in neither of those cases did the automobile driver stop his car before attempting to pass over the railroad track. It is also distinguishable from those cases for the reason that the *Goodman* case was a country grade crossing case and the *Zayac* case occurred three blocks inside of the city limits in a village of some 6,000 people. The opinion in the *Zayac* case discloses that "the tracks were straight as far as the eye could see. There was nothing that obstructed the view for a long distance. We must hold that, within the standard of conduct laid down in the *Goodman* case, Zayac was guilty of contributory negligence."

In the instant case there was a large building built flush with the sidewalk which obstructed the view to the

north of a traveller going west on Edwards Street, and after passing the building a string of box cars on the east track, which had been placed there by the defendant, further obstructed the view. It will be also noted that neither the *Goodman* nor the *Zayac* case contains any willful count. In the *Zayac* case the Court of Appeals held that Zayac was guilty of contributory negligence which, of course, is a good defense to a negligence charge, but is not a defense where there is a willful count and where the evidence shows willful and wanton misconduct on the part of the one inflicting the injury. The trial judge held that the willful and wanton count stated a cause of action and also held that the plea of willful and wanton conduct on the part of the plaintiff did not constitute a legal defense to that count. *A fortiori*, no court that the writer knows of holds that contributory negligence is a defense to an injury willfully and wantonly inflicted.

It may be said that the trial judge held that he would have to disregard that count because there was no evidence of willfulness in this case. (Tr. 55.) In this holding we think the court committed error. The declaration in this case was based on and followed the declaration in the case of *Gerald Taylor, Admr.*, v. *Wheelock and Bierd, Receivers for C. & A. R. R. Co.*, 249 Ill. App. 51, which was a case tried on behalf of plaintiff by the writer of this brief, and which charged willful and wanton conduct on the part of the defendant. It is similar to the instant case in many of its features although the instant case appears to be a stronger case for the plaintiff than was the Taylor case for the reason that

the Wabash train ran into the automobile of the plaintiff (Tr. 35), whereas in the Taylor case decedent drove his automobile into the side of the rear end of the tender or front end of the baggage car after the engine had cleared the crossing. In the Taylor case, certiorari was denied by the Supreme Court, making the opinion of the appellate court final, a $10,000 verdict having been awarded in the court below.

While perhaps the statements of the trial judge in the instant case as to his reasons for directing a verdict for the defendant are not part of the record proper, it was thought only fair to set them forth in full in the transcript (Tr. 52-56). It will be noted that the trial judge quoted that part of the opinion in the *Goodman* case which holds that an automobile driver should get out of his car for the purpose of looking, if he cannot be sure otherwise, whether a train is dangerously near. It seems to counsel for appellant that it is incredible that the Supreme Court meant that statement to apply to drivers of vehicles in populous cities. It simply isn't done by anyone and it seems to be unreasonable to lay down a rule of conduct which probably not one person in a million would be expected to follow. On the other hand it seems unfair to hold that a railroad company may run its trains at a high and dangerous rate of speed through the business district of a populous city, across an intersection where it had placed freight cars which obstructed the view, where no watchman, gates or signal devices of any kind were maintained, and without giving the ordinary and reasonable warning of sounding a whistle or ringing a bell.

The principle announced in the *Goodman* case would be the same if the train in question had been running 75 miles an hour instead of 25 or 30. The pronouncement that trains must run upon rails, that when a man goes upon a railroad track he knows that he must stop for the train, not the train stop for him, is undoubtedly a wise pronouncement in the majority of cases where an accident occurs at a grade crossing, but to hold that a train crew may neglect all ordinary and reasonable precautions for the safety of persons lawfully crossing its tracks and that the railroad company may be absolved from the payment of damages in any event, simply because the train runs on rails and cannot turn out, or cannot stop or start quickly, seems to be carrying the doctrine announced in the *Goodman* case too far. It is not thought possible that the Supreme Court meant to lay down a rule of conduct which absolutely relieves every railroad in the country from paying damages in any event when any person shall be struck at any grade crossing, whether in the country or in the city. If so the railroads might as well do away with bells, whistles, gates, flagmen, warning devices, or anything else that is maintained to contribute to the safety of persons crossing railroad tracks at a highway or public intersection. It seems to counsel for appellant that the rule of conduct laid down in the *Goodman* case should be modified to meet the exigency of this and similar cases.

In *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, decedent was killed at a grade crossing in the City of Detroit resulting in a verdict for the plaintiff adminis-

trator, which was affirmed by the Supreme Court. The environment was set forth, alleging, among other things, obstructions to the view of persons about to cross the tracks, said obstructions consisting of houses, barn and outbuildings, shrubbery, an orchard, trees, etc., so that a traveller could not see an approaching train until within fifteen or twenty feet of the track. It also appeared from the evidence that no watchman was stationed at the crossing in question. The Supreme Court held that the trial court erred in refusing to give an instruction asked in behalf of plaintiff calling attention to the circumstances surrounding the crossing in question, and authorizing the jury to find that a duty may exist to provide a flagman or gates or other warnings or appliances, if the situation of the crossing reasonably requires that, aside from any statutory requirement. In discussing the refusal to give the requested instruction, the court quotes with approval from a case in which it is said:

> "The doctrine with reference to those crossing the track of a railway, where the right to cross exists, is, that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at a crossing in a populous town or city than at ordinary crossings in the country; so what is reasonable care and prudence must depend on the facts in each case. At a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day."

In *Norfolk & W. Ry. Co. v. Holbrook*, 27 Fed. (2nd) 326, a case very similar to the instant case was under consideration by the court of the sixth circuit. While the pleadings are not set forth in the opinion, the evidence discloses that a man was injured at a grade crossing and his wife and child, who were riding with him, were killed. The three cases were tried together, verdicts returned for plaintiff in each case and the verdicts sustained by the Court of Appeals.

In the opinion of counsel for petitioner the opinion in the *Goodman* case should be modified so as to not require persons about to cross railroad tracks in populous cities to get out of their cars and walk ahead for the purpose of obtaining an unobstructed view of the track, and the apparent right granted the railroad companies to operate trains at unlimited speed over grade crossings through populous cities without taking any ordinary or reasonable precaution to prevent injury to travellers lawfully crossing their track, should be curtailed.

Respectfully submitted,

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Counsel for Petitioner.

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals erred in affirming the decision of the United States District Court.

The Circuit Court of Appeals erred in refusing to reverse and remand the case for submission to a jury.

CHARLES S. ANDRUS,
WM. ST. JOHN WINES,
Counsel for Petitioner.